TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 181

THE F. W. FITCH COMPANY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 21, 1944.

CERTIORARI GRANTED OCTOBER 9, 1944.

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 12,749

CIVIL.

UNITED STATES OF AMERICA, APPELLANT,

vs.

THE F. W. FITCH COMPANY, A CORPORATION, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

FILED NOVEMBER 2, 1943.

INDEX.

Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit at the March Term, 1944, of said Court, before the Honorable John B. Sanborn, the Honorable Seth Thomas and the Honorable Walter G. Riddick, Circuit Judges.

Attest:

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

Be it Remembered that heretofore, to-wit: on the 2nd day of November, A. D., 1943, a transcript of record pursuant to an appeal taken from the District Court of the United States for the Southern District of Iowa, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein the United States of America was Appellant and The F. W. Fitch Company, a Corporation, was Appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

[fol. 1] Pleas and Proceedings before the Honorable Chas. A. Dewey, Judge of the District Court of the United States for the Southern District of Iowa, in a certain cause lately pending in the Central Division of said Court, wherein the United States of America is Appellant, and The F. W. Fitch Company, (a Corporation) is Appellee.

Be It Remembered, That on the 25th day of May, A.D. 1942, there was filed in the District Court of the United States for the Southern District of Iowa, Central Division, a Complaint in the case of F. W. Fitch Company, a corporation, Plaintiff, vs. United States of America, Defendant, which case was numbered 191 Civil Action, Central Division, said complaint being in words and figures as follows:

[fol. 2] Complaint

In the United States District Court for the Southern District of Iowa, Central Division

The F. W. Fitch Company, (a Corporation) Plaintiff
No. 191 vs. Civil
United States of America, Defendant

The F. W. Fitch Company brings this, its complaint against the United States of America, pursuant to the provisions of Section 24 (Twentieth) and Section 145, Title 28 (Judicial Code) of the Code of the United States, and for cause of action alleges as follows:

I

The F. W. Fitch Company, plaintiff herein, is and at all times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Iowa, having its principal place of business in the City of Des Moines, Polk County, Iowa.

II

This action is brought to recover Federal manufacturers' excise taxes and interest thereon erroneously and illegally collected from the plaintiff by Charles D. Huston,

Collector of Internal Revenue, for the collection District of Iowa. Said Charles D. Huston at the time he collected said Federal excise taxes was a citizen and resident of Des Moines, Polk County, Iowa and was at that time duly appointed, qualified and acting Collector of Internal Revenue for said District. However, at the time of commencement of these proceedings he is no longer in office.

III

This Court has jurisdiction of the cause of action stated in this complaint in that said cause of action arises under [fol. 3] the laws of the United States, to-wit; the Revenue Act of 1932 (C. 209, 47 Stat. 169). Further this court has concurrent jurisdiction with the United States Court of Claims under Section 24 (Twentieth) of Title 28 of the Code of the United States.

IV

Plaintiff's claim for recovery of Federal excise taxes and interest thereon erroneously and illegally collected from plaintiff, as aforesaid, is based upon the following facts:

(1) During the months commencing October 1, 1936 to July 1, 1939, plaintiff was engaged in the manufacture and sale of toilet preparations which were subject to a manufacturers' excise tax under the provisions of Section 603 of the Revenue Act of 1932, equivalent in amount to ten percent (10%) of the price for which said articles were sold. Included among such articles were Fitch's Ideal Hair Tonic, various massage, cleansing and toilet creams and other kindred items. During the months commencing October 1, 1936 to July 1, 1938, plaintiff was also engaged in the manufacture of articles which were subject to a manufacturers' excise tax under the provisions of Section 603 of the Revenue Act of 1932, equivalent in amount to 5% of the price for which said articles were sold. Such articles, subject to a tax of 5%, consisted of dentrifices, tooth paste and toilet soaps, the principal item being known as "Fitch's Dandruff Remover Shampoo".

(2) During the months commencing October 1, 1936 to July 1, 1939 plaintiff sold said articles subject to an excise tax at the rate of 10% for a total sales price of $2,204,000.-80. Said sales price included all charges for all coverings and containers of whatever nature and all charges inci-

dent to placing the said articles in condition packed ready for shipment, but excluded the amount of tax imposed by Title IV of the Revenue Act of 1932. During the months commencing October 1, 1936 to July 1, 1938 plaintiff sold said above referred to articles, which were subject to an excise tax at the rate of 5% for a total sales price of $1,897,531.80. As in the case of articles subject to the excise tax at the rate of 10%, said sales price included [fol. 4] all charges for coverings, containers and all charges incident to placing the articles in condition packed ready for shipment, but excluded the amount of the tax.

(3) Said articles, [aforsaid], were sold through arm's length transactions to wholesalers and jobbers.

(4) For each of the months from October 1, 1936 to July 1, 1939 plaintiff filed with the Collector of Internal Revenue for the District of Iowa, due and proper returns known as Treasury Department Form 728, on which were disclosed a manufacturers' excise tax liability under the provisions of Section 603 of the Revenue Act of 1932, based upon its sales of said articles during said months. The aggregate sales price for articles subject to the 10% tax amounted, as aforesaid, to $2,204,000.80 on which a total tax in the amount of $220,400.08 was returned and paid. The aggregate amount of the sales price of articles subject to the excise tax at the rate of 5% which was returned amounted to $1,897,531.80 upon which a total tax in the sum of $94,876.59 was returned and paid.

(5) During the period commencing October 1, 1936 to and including June 30, 1939, the plaintiff paid or incurred liability for salesmen's commissions, radio advertising, other advertising and other selling costs and expenses in respect of sales of the aforesaid articles upon which a manufacturers' excise tax, at the rate of 10%, was returned and paid, in the amount of $846,262.78 in addition to the costs and expenses for freight and discount.

During the period extending from October 1, 1936 to and including June 30, 1938 the plaintiff paid or incurred liability for salesmen's commissions, radio advertising, other advertising and other selling costs and expenses in respect of sales on which a 5% manufacturers' excise tax was returned and paid in the amount of $729,235.44 in

addition to the said costs and expenses for freight and discount.

(6) In respect to articles sold by the plaintiff to barber and beauty supply dealers, syndicate and chain stores and customers purchasing a line of cosmetics known as "Beauty by Fitch", the plaintiff did not add the manu- [fol. 5] facturers' excise tax to the selling price, but absorbed said tax. In respect to articles sold by the plaintiff to drug jobbers and wholesalers, and in respect to sale of Special Label merchandise, the plaintiff added the tax to the selling price and no refund of manufacturers' excise tax paid on such sales is claimed.

(7) During the period extending from October 1, 1936 to and including June 30, 1939, plaintiff manufactured and sold articles on which the 10% excise tax was levied and paid to barber and beauty supply dealers, syndicate and chain stores and customers purchasing the line of cosmetics known as "Beauty by Fitch" in the amount of $1,298,181.60. The tax imposed on such sales was the sum of $129,818.16, no part of which was added to or included in the selling price.

During the period extending from October 1, 1936 to and including June 30, 1938 plaintiff manufactured and sold articles on which the 5% excise tax was imposed to barber and beauty supply dealers, syndicate and chain stores and customers purchasing the line of cosmetics known as "Beauty by Fitch" in the amount of $566,876.40. The tax imposed on such sales was the sum of $28,343.82 no part of which was passed on to the purchaser nor included in the selling price.

(8) With respect to articles manufactured and sold by the plaintiff to barber and beauty supply dealers, syndicate and chain stores and customers purchasing the line of cosmetics known as "Beauty by Fitch" and upon which the 10% excise tax was levied and paid, no part of same being passed on to the purchaser, the plaintiff expended the sum of $572,270.12 for advertising and selling expense.

With respect to articles manufactured and sold by the plaintiff to barber and beauty supply dealers, syndicate and chain stores and customers purchasing the line of cosmetics known as "Beauty by Fitch" and upon which

the 5% excise tax was levied and paid, no part of same being passed on to the purchaser, the plaintiff expended the sum of $253,946.65 for advertising and selling expense.

(9) In its monthly excise tax returns, the plaintiff did not deduct from the selling price upon which the tax was [fol. 6] levied and paid, the amounts expended as set out in the preceding paragraph for advertising and selling expense. By reason of the plaintiff's failure to deduct advertising and selling expense from the selling price upon which the tax was paid, the plaintiff overpaid manufacturer's excise taxes on items taxable at the rate of 10% during the period extending from October 1, 1936 to and including June 30, 1939, in the sum of $57,226.98.

By reason of the plaintiff's failure to deduct advertising and selling expense from the selling price upon which the tax was paid, the plaintiff overpaid manufacturers' excise taxes on items taxable at the rate of 5% during the period extending from October 1, 1936 to and including June 30, 1938 in the sum of $12,692.33.

V

On or about November 11, 1936, the plaintiff duly filed with the Collector of Internal Revenue for the District of Iowa its monthly manufacturers' excise tax return under Section 603 for the month of October 1936. Each month thereafter the plaintiff duly filed its return during the periods hereinbefore mentioned as required under said Section. On the 8th day of October 1940 plaintiff duly filed a claim for refund of manufacturers' excise taxes covering the periods hereinbefore referred to, claiming refund of said taxes in the amount of $67,666.39 by reason of plaintiff's failure to deduct advertising and selling expenses in computing the tax due. A copy of said claim for refund is hereto attached, marked Exhibit "A" and hereby made a part hereof.

VI

On June 12, 1941 the Commissioner of Internal Revenue addressed a letter, by registered mail, to plaintiff advising it that its claim for refund was rejected in full. A copy of said letter of rejection is hereto attached, marked Exhibit "B" and made a part hereof.

VII

The rejection of said claim for refund by the Commissioner of Internal Revenue was erroneous and the collec- [fol. 7] tion of the said taxes was erroneous and illegal in that the Commissioner of Internal Revenue failed and neglected to reduce the selling price of the articles upon which the tax was based by the amount expended for advertising and selling costs incurred by said plaintiff, as hereinbefore set out.

Wherefore, plaintiff demands judgment against defendant in the sum of Sixty-nine Thousand, Nine Hundred Nineteen Dollars and thirty-one cents ($69,919.31), together with interest as provided by law and for the costs and disbursements of this action.

THE F. W. FITCH COMPANY
By F. W. Fitch, President.

Arnold F. Schaetzle
203 Hubbell Building,
Des Moines, Iowa.

Richard E. Williams
203 Hubbell Building,
Des Moines, Iowa.
Attorneys for Plaintiff.

State of Iowa
County of Polk—ss.:

F. W. Fitch, being first duly sworn, on oath, deposes and says that he is president of Plaintiff; that he is duly authorized by Plaintiff to make this affidavit on its behalf; that he has read the above and foregoing Complaint and knows the contents thereof, and that the same is true, except as to matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

F. W. FITCH

Subscribed and sworn to before me this 13th day of May, 1942.

(Seal) RUTH LITTELL,
Notary Public.

Form 843
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
(Revised April 1940)

EXHIBIT "A"

CLAIM

TO BE FILED WITH THE COLLECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

COLLECTOR'S STAMP
(Date received)

- ☐ REFUND OF TAX ILLEGALLY COLLECTED.
- ☐ REFUND OF AMOUNT PAID FOR STAMPS UNUSED, OR USED IN ERROR OR EXCESS.
- ☐ ABATEMENT OF TAX ASSESSED (not applicable to estate or income taxes).

STATE OF IOWA
COUNTY OF POLK } ss:

TYPE OR PRINT

Name of taxpayer or purchaser of stamps THE F. W. FITCH COMPANY

Business address 15th & Walnut Sts., (Street) Des Moines (City) Iowa (State)

Residence

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed Des Moines, Iowa
2. Period (if for income tax, make separate form for each taxable year) from Oct. 1, 1936, to July 1, 1940
3. Character of assessment or tax Manufacturers' Excise Tax
4. Amount of assessment, $ 67,666.39; dates of payment Monthly payments
5. Date stamps were purchased from the Government
6. Amount to be refunded $ 67,666.39
7. Amount to be abated (not applicable to income or estate taxes) $
8. The time within which this claim may be legally filed expires, under Section 3313 of the Revenue Act of 1932, on Oct. 11, 1940

The deponent verily believes that this claim should be allowed for the following reasons:

Statement attached

☐ REFUND OF TAX ILLEGALLY COLLECTED.

☐ REFUND OF AMOUNT PAID FOR STAMPS UNUSED, OR USED IN ERROR OR EXCESS.

☐ ABATEMENT OF TAX ASSESSED (not applicable to estate or income taxes).

STATE OF IOWA
} ss:
COUNTY OF POLK

TYPE OR PRINT

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6. Amount to be refunded $ 67,666.39
7. Amount to be abated (not applicable to income or estate taxes) $
8. The time within which this claim may be legally filed expires, under Section 3313 of the Revenue Act of 1932, on Oct. 11, 1940

The deponent verily believes that this claim should be allowed for the following reasons:

Statement attached

(Attach letter-size sheets if space is not sufficient)

Sworn to and subscribed before me this 5TH day of October 1940

Signed THE F. W. FITCH COMPANY

By

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax: (Show, in the ninth column, by symbols "Pd.," "Ab.," or "Cr.," the nature of each entry in the eighth column.)

Claim No. _____

Class of tax and taxable year or period	ASSESSMENT LIST			ACCOUNT NO. OR		Amount assessed		PAID, ABATED, OR CREDITED			Pd. Ab. Cr.
	List	Month	Year	Page	Line			Date	Amount		
						$			$		
					Total,	$		Total,	$		

Claim No. _____

I certify that the records of this office show the following facts as to the purchase of stamps:

TO WHOM SOLD OR ISSUED	Kind	Number	Denomination	Date of sale or issue	Amount		If special tax stamp, state:	
							Serial number	Period commencing—
					$			

_____
Collector of Internal Revenue. (District)

Claim examined by—

Claim approved by—

Chief of Division.

COMMITTEE ON CLAIMS

Amount claimed... $_____ _____

Amount allowed... $_____ _____

Amount rejected... $_____ _____

INSTRUCTIONS

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof

Claim No.												
					Total,	$			Total,	$		

I certify that the records of this office show the following facts as to the purchase of stamps:

To Whom Sold or Issued	Kind	Number	Denomination	Date of sale or issue	Amount		If special tax stamp, state: Serial number	If special tax stamp, state: Period commencing—
					$			

Collector of Internal Revenue. (District)

Claim examined by—
Claim approved by—
Chief of Division.

COMMITTEE ON CLAIMS

Amount claimed... $_____

Amount allowed... $_____

Amount rejected... $_____

INSTRUCTIONS

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.

3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

16—16504

[fol. 9] The F. W. Fitch Company, of Des Moines, Iowa under and by virtue of the manufacturers excise tax law, effective date of which was June 1, 1932, has wrongfully been assessed and has paid excise taxes in the amount of $67,666.39. In making out the monthly returns for the manufacturers excise tax The F. W. Fitch Company did not deduct during the period extending from October 1, 1936 to and including June 30, 1940, the amount of money spent on advertising and sales expenditures. According to the terms of the Revenue Act, it is proper and lawful to deduct from the sale price the amount of money spent on advertising and sales.

From October 1, 1936 to and including June 30, 1940, The F. W. Fitch Company has spent $252,561.60 in advertising and selling items on which a 5% manufacturers excise tax was levied and collected. From October 1, 1936 to and including June 30, 1940 The F. W. Fitch Company has spent $550,383.10 in advertising and selling items on which a manufacturers excise tax of 10% was levied and collected. In other words, The F. W. Fitch Company has wrongfully and illegally been assessed and has paid a 5% tax on $252,561.60 and The F. W. Fitch Company has wrongfully been assessed and has paid a 10% tax on $550,383.10. 5% on the former amount is $12,628.08 and 10% of the second amount is $55,038.31. Thus, The F. W. Fitch Company has wrongfully been assessed and has paid $67,666.39 in manufacturers excise taxes during the above described period that it would not have been necessary for The F. W. Fitch Company to pay.

Furthermore, the amount of tax which The F. W. Fitch Company now seeks to have refunded has been absorbed by The F. W. Fitch Company and has not been passed on to its customers. For these reasons The F. W. Fitch Company respectfully submits that it is entitled to a refund of manufacturers excise taxes in the amount of $67,666.39.

[fol. 10] Exhibit "B"

June 12, 1941.

MT:ST:BMH
Cl. S-88870

The F. W. Fitch Company,
15th and Walnut Streets,
Des Moines, Iowa.

Gentlemen:

Reference is made to your claim for refund in the amount of $67,666.39 representing tax paid by you for the period from October 1936 through June 1940 with respect to sales of toilet preparations.

Your claim was originally filed to recover amounts alleged to have been paid with respect to advertising and selling expenses. Mr. Schaetzle's letter of April 28, 1941, stated that you wish to withdraw your claim for the period from July 1939 through June 1940, inasmuch as the allowable deductions had been claimed for that period at the time of the filing of your returns. Mr. Schaetzle did not, however, withdraw that part of the claim covering the period from October 1936 through June 29, 1939, and, notwithstanding office letter of December 30, 1940, which advised that the Bureau holds advertising and selling expense not to have been allowable as deductions prior to June 30, 1939, requested that a conference be arranged to be held on May 27, 1941.

Office letter of May 12, 1941, reiterated the Bureau's position with respect to the deductibility of advertising and selling expenses prior to June 30, 1939, but stated that the time suggested by Mr. Schaetzle had been reserved for a conference if, regardless of the position of the Bureau, one was desired.

Neither you nor your representative appeared for the conference on May 27, 1941, and it is assumed that you do not care to pursue the matter further. Your claim, is therefore, rejected in full.

Regardless of the foregoing, no allowance could be made with respect to your claim in view of section 621(d) of the Revenue Act of 1932 and section 3443(d) of the

Internal Revenue Code since, although you have stated that you did not collect the tax from your customers or include it in your selling price, you have not procuded evidence to substantiate your statement.

Respectfully,
GUY T. HELVERING
Commissioner
By D. S. Bliss
Deputy Commissioner

cc-Des Moines, Iowa
cc-Mr. Arnold P. Schaetzle
Hubbell Building
Des Moines, Iowa

[fol. 11] (Summons and Marshal's Return of Service.)

Filed in U. S. District Court on May 26, 1942.

To the above named Defendant:

You are hereby summoned and required to serve upon Richard E. Williams and Arnold F. Schaetzle, plaintiff's attorneys, whose address 203 Hubbell Bldg., Des Moines, Iowa, an answer to the complaint which is herewith served upon you, within sixty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

N. F. REED,
Clerk of Court.

Date May 25th, 1942.

By Justine Hummel,
Deputy Clerk.
(Seal)

Return on Service of Writ.

I hereby certify and return, that on the 25th day of May, 1942, I received the within summons and on the same date, at Des Moines, Iowa, I duly served United States of America, by offering to read the original writ to Cloid I. Level, Asst. U. S. Attorney, Southern District of Iowa,

which reading was waived, and delivered to him a true copy of this writ together with a copy of the Bill of Complaint.

Marshal's Fees.	
Travel 1	$ .06
Service 1	2.00
	$2.06

JAMES J. GILLESPIE,
U. S. Marshal.
By Virgil Lekin,
Deputy United States Marshal.

[fol. 12] Answer

Filed in U. S. District Court November 12, 1942.

The defendant, by its attorney, Maurice F. Donegan, United States Attorney for the Southern District of Iowa, for its answer to the complaint:

1. Admits the allegations contained in paragraphs I, V, and VI of the complaint.

2. Denies that the excise taxes and interest involved in this action were erroneously and illegally collected, but admits the other allegations contained in paragraph II of the complaint.

3. Denies the allegations contained in paragraph III of the complaint.

4. Admits that plaintiff was engaged in the manufacture and sale of toilet preparations subject to manufacturers' excise tax under Section 603 of the Revenue Act of 1932 during the months of October, 1936, to June, 1939, inclusive, and admits that due and proper excise tax returns were filed by the plaintiff with the Collector of Internal Revenue for the District of Iowa for the said period, but denies that the excise taxes claimed in this action to have been erroneously and illegally collected from the plaintiff were not included in the sales prices of plaintiff's [fol. 13] articles with respect to which they were imposed, and, as to each and every other allegation contained in subparagraphs (1) to (9), inclusive, of paragraph IV, defendant denies that it has any knowledge or information sufficient to form a belief as to the truth of such allegations.

5. Denies that plaintiff overpaid manufacturers' excise taxes in the amounts alleged in paragraph IV, subparagraph (9), of the complaint.

6. Denies the allegations contained in paragraph VII of the complaint.

First Special Defense

7. Alleges that the complaint fails to state a claim against defendant upon which relief can be granted.

Second Special Defense

8. Asserts that the Court lacks jurisdiction of this action because plaintiff's claim for refund for the taxable period in suit is insufficient.

Third Special Defense

9. Asserts that this action cannot be maintained against the defendant because of plaintiff's failure to comply with the provisions of Section 621 (d) of the Revenue Act of 1932 and Section 316.94 of Regulations 46, promulgated thereunder.

Wherefore, defendant demands judgment dismissing the complaint, together with the costs and disbursements of the action.

MAURICE F. DONEGAN
United States Attorney

WILLIAM R. SHERIDAN
Assistant United States Attorney

[fol. 14] Memorandum Opinion.

Filed in U. S. District Court June 19, 1943.

The above entitled action came on for hearing on its merits at Des Moines, Iowa, on the 24th and 25th days of May, 1943, evidence was introduced, arguments had, and the suit fully submitted to the court for decision.

In the action the plaintiff seeks to recover from the United States of America certain manufacturers' excise taxes alleged to have been illegally and wrongfully paid to the Collector of Internal Revenue commencing with October 1936 and ending with June 1939.

Commencing with October 1936 and ending with June 1939 plaintiff filed manufacturers' excise tax returns with respect to the toiletries and cosmetics manufactured and

sold by it, reporting thereon tax liabilities in the aggregate amount of $319,170.48, which was assessed and paid on the dates of the filing of said monthly returns. Some of the articles so manufactured and sold by the plaintiff were taxable under the applicable statutes at the rate of 10 per cent. while others were taxable at the rate of 5 per cent.

On October 8, 1940, plaintiff filed a claim for a refund of $67,666.39, on the excise taxes paid for the period from [fol. 15] Oct. 1, 1936, to June 30, 1940. The claim was based on the ground that in making out its monthly returns plaintiff erroneously failed to deduct from the selling price of its toilet articles the amount it spent for selling and advertising, and therefore there had been wrongfully assessed and paid by it the above excise taxes.

In its claim so filed the taxpayer stated that the amount of the tax sought to be refunded was absorbed by plaintiff and had not been passed on to its customers.

On the trial the taxpayer introduced evidence establishing that it did pay the tax as aforesaid and that during said period it had spent a large amount in the cost of selling and advertising of its products and that a large proportion of its sales was made to barbers, beauty supply dealers, chain stores and customers purchasing a line of [cosmeteis] known as "Beauty by Fitch" and that all such sales were made at arm's length; that the plaintiff on all of such sales did not add the manufacturer's excise tax to the selling price but absorbed and bore the burden of said tax. However, in respect to articles sold by the plaintiff to drug jobbers and wholesalers and in respect to sales of special labeled merchandise the plaintiff added the tax to the selling price and no refund of the manufacturers' excise tax paid on such sales is claimed.

Also, that a proper and fair method of computing the amount of the credit for the expense of selling and advertising on the manufacturing cost of those articles upon which the refund is claimed is the percentage that such costs bear to the cost of the entire output and sales of the taxpayer's manufactured products covered by the advertising and selling.

The Government did not offer any evidence to refute the facts established by the taxpayer as above. It claims, however, that the evidence taken as a whole fails to establish that the taxpayer absorbed the tax on those products for which it claims it is entitled to a refund; but I find that [fol. 16] the taxpayer has fairly established that it did so absorb the tax; reported and paid the same and is entitled to a refund therefor. Campana Corporation v. Harrison, 114 F. 2d 400.

The Government relies principally in addition to challenging the decision of the Campana case, upon its affirmative defenses set out in its answer:

1st, that the complaint fails to state a claim against the defendant upon which relief could be granted.

2nd, that the court lacks jurisdiction of the action because plaintiff's claim for refund for the tax period in suit is insufficient. And

3d, that the action cannot be maintained against the defendant because of plaintiff's failure to comply with the provisions of Sec. 621 (d) of the Revenue Act of 1932, and Section 316.94 of Regulations No. 46 promulgated thereunder.

The defense that the complaint fails to set forth a claim against the defendant is the same, as I understand it, as the other defenses which have to do with the jurisdiction of the court. It is the contention of the Government that the claim filed by the taxpayer before the Commissioner only states in general terms that—

"the amount of tax which the F. W. Fitch Company seeks to have refunded has been absorbed by the F. W. Fitch Company and has not been passed on to its customers."

That this allegation is not sufficient to give the Commissioner authority to refund a claim, but that additional evidence must be presented to the Commissioner to establish such conclusion on the part of the taxpayer, as required by certain statutes and regulations. This statute is:

Section 621 (d) of the 1932 Revenue Act:

"No overpayment of tax under this Title shall be credited or refunded . . . in pursuance of a court decision or otherwise, unless the person who paid the tax establishes, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary.

(1) that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of the tax from the vendee, * * *"

[fol. 17] And Article 71 of Treasury Regulations No. 46, (now 316.94, 1940 edition Regulations No. 46), reading as follows:

"Credits and Refunds. * * *

If any person overpays the tax due with one monthly return, he may either file a claim for refund on Form 843 or take credit for the overpayment against the tax due with any subsequent monthly return. In all cases . . . where a person overpays tax, no claim or refund shall be allowed, whether in pursuance of a court decision or otherwise, unless the taxpayer files a sworn statement explaining satisfactorily the reason for claiming the credit or refund and establishing (1) that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of the tax from the vendee . . ."

The taxpayer as stated above in his claim filed for the refund only stated generally that he had absorbed the tax and did not establish such general allegation by any evidence; and had the Commissioner passed upon plaintiff's claim on its merits and denied the same it may be that this defense of the Government would be well taken. Lee Wilson & Co. v. Commissioner, 11 F. 2d 313, 317 and 123 F. 2d 232; Landrum v. Commissioner, 122 F. 2d 857; Weiss v. United States, F 2d (CCA 7, opinion dated May 17, 1943, reported in Prentice-Hall Tax Service p. 62852, affirming decision by Judge Holly).

However, there is considerable history in connection with the filing of the claim by the taxpayer and its disposition by the commissioner. The claim as originally filed asked for a refund from October 1, 1936, to June 30, 1940. The

claim was filed October 8, 1940, and acknowledged by the Commissioner on December 30, 1940, in a letter which stated, among other things, as follows:

"You are advised that the provisions of section 3 of the Revenue Act of 1939 . . . are not retroactive in their effect. Selling and advertising expenses incurred prior to July 1, 1939 do not therefore represent allowable deductions from taxable sales and no consideration may be given to your claim with respect to any tax paid for a period prior to that date."

And—

"Your statement is noted that you did not pass the tax on to your customers but [sbsorbed] it. The mere statement does not constitute a basis for a finding by the Commissioner that you have established your compliance with section 621 (d) of the Revenue Act of 1932 . . .

[fol. 18] You are therefore requested to forward to this office any evidence which in your opinion will substantiate your contention on this point."

After some correspondence in which the Commissioner asked for further evidence, the taxpayer filed with the Commissioner on April 29, 1941, a paper designated as a "Brief", with supporting schedules and data in connection with the refund claim. This statement of the taxpayer sets forth detailed information as to each month of sales to the several customers, as above stated, showing the percentage of such sales to the total net sales, the net sales, freight deducted, taxable sales reported, selling and advertising expenses not deducted, corrected taxable sales, corrected tax, tax paid, and refund due. These statements are shown for each month and with a summary of the Corrected Tax, Tax Paid and a claim for Refund Due of $69,919.31.

In its argument to the Commissioner accompanying said brief the taxpayer, through its attorneys, after stating that it is relying upon the case of Campana Corporation v. Harrison, 114 F. 2d 400, makes the following statement:

"The claim for refund is based only upon sales made by the taxpayer to barber and beauty supply houses, syndi-

cate stores and sales of "Beauty by Fitch" merchandise. In the above fields the taxpayer absorbed the tax and charged its purchaser identically the same price for merchandise after the effective date of the Revenue Act of 1932, as it had charged previous to that date. On sales made by the taxpayer in the drug store field, the manufacturer's excise tax was passed on to the purchaser and no claim for refund is made on such sales.

If a conference is granted in connection with this matter there will be submitted at that time actual invoices showing that the tax was absorbed by the company in those sales markets wherein the refund is claimed."

To this communication the Commissioner on May 12, 1941, among other things, replied:

"Reference is also made to Mr. Schaetzle's letter of April 28, 1941, transmitting to this office a brief in support of your claim and requesting that a conference be arranged to be held at 10:00 a.m. on May 27, 1941. Mr. Schaetzle states that your claim, so far as it relates to the period subsequent to June 29, 1939, is withdrawn, being retained only for the purpose of claiming the advertising and selling expenses incurred prior to June 30, 1939.

[fol. 19] This being true, it does not appear that any benefit can be derived from the holding of a conference since as you were advised by office letter of December 30, 1940, the Bureau holds that advertising and selling expenses were not allowable prior to June 30, 1939.

In support of your contention for the deductions you cite the decision of the United States Circuit Court of Appeals for the Seventh Circuit, in the case of Campana Corporation v. Harrison. This office does not concede the correctness of the Campana decision and adheres to the position stated above. This position is fully supported by the decision of the United States Court of Claims rendered on April 7, 1941, in the case of The Ayer Company v. United States.

Although as stated above, it does not appear that any benefit could be derived from the holding of a conference, the hour of 10:00 a.m. on May 27, 1941, has been reserved

for the purpose of a conference if you wish to appear, notwithstanding the position of the Bureau."

On June 12, 1941, the Commissioner addressed a letter to the F. W. Fitch Company in which the Commissioner reiterated his statement that the Bureau holds that advertising and selling expenses are not allowable as deductions prior to June 30, 1939, and further stated—

"Neither you nor your representative appeared for the conference on May 27, 1941, and it is assumed that you do not care to pursue the matter further. Your claim is, therefore, rejected in full."

And after this, is the following—

"Regardless of the foregoing, no allowance could be made with respect to your claim in view of section 621 (d) of the Revenue Act of 1932 and section 3443 (d) of the Internal Revenue Code since, although you have stated that you did not collect the tax from your customers or include it in your selling price, you [jave] not produced evidence to substantiate your statement."

From the foregoing and other correspondence it is apparent that immediately upon the filing of the claim by the taxpayer the Commissioner took the position that he would not refund advertising and selling expenses as manufacturer's costs on any claim for refund of taxes prior to June 30, 1939; that any conference or hearing on the taxpayer's claim for refund prior to June 30, 1939, would be futile and ineffective, as the Bureau was committed to a refusal of such claims made prior to June 30, 1939; that it would adhere to the decision in the case of Ayer v. United States, 38 F. Supp. 284, and would not follow the Campana case, supra.

[fol. 20] Its position that additional evidence was necessary before the Commissioner would consider the merits, referred to the claim of the taxpayer for refund of the taxes paid subsequent to June 30, 1939, afterwards waived by the taxpayer.

The statement in the letter from the commissioner dated June 12, 1941, following the rejection of the claim in full, to the effect that the allowance could not be made in any

event because of the failure to file the additional evidence appears to be an afterthought and would not, in my opinion, affect the waiver of the filing of such evidence which the Commissioner had clearly indicated in his former communications.

It seems to me that on the entire record and considering these letters any by the refusal to consider proffered proof the Commissioner has waived any statutory requirements or its own regulations regarding the necessity of the filing of evidence establishing that the taxpayer had borne the burden of the tax. Tucker v. Alexander, 275 U. S. 228, 231; Bonwit Teller & Co. v. United States, 283 U. S. 258, 264; United States v. Memphis Cotton Oil Co., 228 U. S. 62, 71; United States v. Jefferson Electric Co., 291 U. S. 386; United States v. Garbutt Oil Co., 302 U. S. 528, 533; University Distributing Co. v. United States, 22 F. Supp. 794; Shotwell Mfg., Co. v. Harrison, 27 F. Supp. 422; Gottlieb v. Harrison, 27 F. Supp. 424; Con-Rod Exchange v. Henrickson, 27 F. Supp. 427; S. & R. Grinding & Machine Co. v. United States, 27 F. Supp. 429.

The case of Samara v. United States, 129 F. 2d 594, relied upon the Government is not in point as it involved a different statute and the question of waiver was not present.

In determining the question of whether or not advertising and selling expenses are proper deductions from manufacturer's costs, I feel that I am bound to follow the decision of a Circuit Court of Appeals rather than that of the Court of Claims.

The Government also contends by apt objections to the [fol. 21] evidence during the trial and in argument that the taxpayer was not entitled to introduce evidence different from that presented in its claim to the Commissioner.

The Government here again relies upon the Samara case, supra, but the court there was considering a statute which required all the evidence relied upon by the taxpayer to support its claim that it bore the entire burden of the tax to be filed with the commissioner, and decision by the commissioner was on the merits.

The general rule, as I understand it, is that the trial here is de novo, the evidence not being limited to that presented to the commissioner but new and additional evidence may [de] adduced. Tacker v. Alexander, 275 U. S. 228; U. S. v. Rindskopf, 105 U. S. 418; Fidelity & Columbia Trust Co., v. Lucas, 7 F. 2d 146, (D.C.W.D.Ky.); Paul Jones Co. v. Lucas, 33 F 2d 907, affirmed, 64 F. 2d 1016.

And recovery may be had for a sum less than the amount of the refund asked by the claim. United States [—] Rindskopf, supra.

The only limitation is that recovery can only be had on the grounds presented to the commissioner. Taber v. United States, 59 F. 2d 568, 571 (8 CCA); Paul Jones Co. v. Lucas, supra.

The claim, of course, must be in sufficient detail to apprise the Commissioner of the grounds upon which the refund is asked to facilitate research by him. United States v. Garbutt Oil Co., 302 U. S. 528, 533; Lee Wilson & Co. v. Commissioner, supra.

I am satisfied and find that the evidence introduced by the taxpayer was based upon grounds of recovery set forth in its claim and was sufficient in detail to apprise the commissioner of its claim, and further evidence would have been adduced before the commissioner had it not been for his position that recovery could not be had for refunds [fol. 22] prior to June 30, 1939, as a matter of law.

I am resolving the case in favor of the taxpayer and the attorneys for the F. W. Fitch Company may prepare findings of fact and conclusions of law in keeping with the findings of fact and conclusions of law made or suggested herein, and exceptions are allowed.

Signed this 19th day of June, 1943.

CHAS. A. DEWEY,
United States District Judge.

[fol. 23] Findings of Fact and Conclusions of Law

Filed in U. S. District Court August 10, 1943.

The above entitled action came on for hearing on its merits at Des Moines, Iowa, on the 24th and 25th days of

May, 1943, evidence was introduced, arguments had, and the suit fully submitted to the court for decision.

In the action the plaintiff seeks to recover from the United States of America certain manufacturer's excise taxes alleged to have been illegally and wrongfully paid to the Collector of Internal Revenue commencing with October, 1936 and ending with June, 1939.

Findings of Fact

1. The F. W. Fitch Company, plaintiff herein, is and was during the period from October 1, 1936 and throughout the period covered by this controversy, a corporation organized and existing under the laws of the State of Iowa, with its principal place of business in the City of Des Moines, Iowa, within the jurisdiction of this court.

2. That plaintiff was during said period engaged in the manufacture and sale of cosmetics and toiletries which were subject to the manufacturer's excise tax, some of which were taxable at the rate of 10% and some at the [fol. 24] rate of 5%.

3. For the period from October 1, 1936 to and including the month of June, 1939 plaintiff duly filed monthly manufacturer's excise tax returns, reporting thereon tax liabilities in the aggregate amount of $319,170.48 which was assessed and paid on the date of filing of the said monthly returns.

4. That said payments were made to Chas. D. Huston, Collector of Internal Revenue for the Collection District of Iowa. That said Chas. D. Huston was not in office as the Collector of Internal Revenue at the date of the commencement of this action.

5. On October 8, 1940 plaintiff duly filed a claim for refund on form 843, which is a form printed and published by the Treasury Department for the filing of refund claims with respect to manufacturer's excise taxes levied under the Revenue Act of 1932 and subsequent amendments; that in said claim plaintiff demanded a refund of $67,666.39 for excise taxes paid for the period extending from April 1, 1936 to and including June 30, 1940.

6. The Court finds that immediately upon the filing of the claim by the taxpayer the Commissioner took the position that he would not refund advertising and selling expenses as manufacturer's costs or any claim for refund of taxes on said expenditures prior to June 30, 1939; that any conference or hearing on the taxpayer's claim for refund prior to June 30, 1939 would be futile and ineffective. And that the Bureau was committed to a refusal of such claims made prior to June 30, 1939; and that it would adhere to the decision in the Ayer vs. United States, 39 F. Supp. 284, and would not follow the Campana case.

7. The Commissioner's request for additional evidence relating to proof that the tax had been absorbed by the taxpayer, referred only to the period subsequent to June 30, 1939, after which date selling and advertising expenses were deductible by the 1939 amendment to section 3441.

8. The plaintiff in its correspondence with the Commissioner waived its claim for the period after June 30, 1939.

[fol. 25] 9. The statement in the letter from the Commissioners dated June 12, 1941, following the rejection of the claim in full, to the effect that the allowance could not be made in any event because of the failure to file the additional evidence was an afterthought and would not effect the waiver of the filing of such evidence which the Commissioner had clearly indicated in his former communications. The submission of additional evidence on the proposition that the taxpayer had not passed the tax on to the consumer would not have changed the Commissioner's decision with respect to the deductibility of selling and advertising expenses.

10. Plaintiff divided its customers into five classifications, namely, barber and beauty supply dealers, chain and syndicate stores, customers purchasing a line of cosmetics known as "Beauty by Fitch", wholesale and retail drug stores, and purchasers of special label merchandise.

11. The above classifications of customers paid no more to plaintiff for its merchandise because of the imposition of the manufacturer's excise tax. Plaintiff paid the tax and did not pass it on to its customers.

12. Plaintiff also sold merchandise to drug jobbers and wholesalers and special labeled merchandise and on such sales added the tax to the selling price, no refund thereof is claimed.

13. During the period in controversy, plaintiff expended the sum of $2,088,510.90 for selling and advertising all of its products and a large proportion of its sales was made to barbers, beauty supply dealers, chain stores and customers purchasing a line of cosmetics known as "Beauty by Fitch" and all such sales were made at arm's length; and on all of such sales plaintiff did not add the manufacturer's excise tax to the selling price but [sbsorbed] and bore the burden of said tax.

14. Plaintiff did not deduct from its selling price, the amount expended in advertising and selling said products.

[fol. 26] 15. The reasonable, proper and fair method of computing the amount of credit for the expense for selling and advertising between the various classifications of sales is to make such allocation in the proposition that each classification of sales bears to the total sales of all articles advertised and sold.

16. The amount of selling and advertising expense chargeable to sales to barber and beauty supply dealers and stores, sales to chain and syndicate store and sales of products known as "Beauty by Fitch" and which were subject to the manufacturer's excise tax at the rate of 5% is the sum of $574,796.67; that the amount of advertising and selling expense properly chargeable to sales of merchandise to barber and beauty supply dealers and stores, chain and syndicate stores and products known as "Beauty by Fitch" and which were taxable at the rate of 10% is the sum of $236,321.06. That no part of said expense was deducted from the sales price of such merchandise in calculating and paying the excise tax. That the items comprising the above expense are properly classified as, and are selling and advertising expenses.

17. Selling and advertising expenses are deductible from the selling price in computing and selling price upon which the manufacturer's excise tax is based.

18. From October 1, 1936 through and including June 30, 1939, plaintiff paid to defendant $59,718.88 in excess of the amount of manufacturer's excise taxes owed by plaintiff. Defendant owes plaintiff $59,718.88 and interest thereon from the dates of payment to the date of the decision of this court; interest in the amount of $19,309.89.

19. The parties hereto entered into a stipulation attached to which there were certain exhibits, the contents of said stipulation and exhibits are found to be true and correct facts of what they purport to show.

[fol. 27] Conclusions of Law

1. This court has jurisdiction of the parties and subject matter of this action.

2. Trial on the issues of this court is de nono, the evidence is not limited to that presented to the Commissioner, new and additional evidence may be adduced.

3. Any recovery may be had for a sum less than the amount of the refund asked by the claim. The only limitation is that recovery can only be had on the grounds presented to the Commissioner.

4. The Commissioner waived his regulations and compliance therewith regarding the necessity of the filing of evidence establishing that the tax payer had borne the burden of the tax.

5. Selling and advertising expenses are deductible from the sales price of the cosmetic and toiletries sold by plaintiff during the period in controversy for the purpose of ascertaining the manufacturer's excise tax and said deductions consisting of selling and advertising expenses are not subject to said tax. Campana Corp. vs. Harrison, 114 F. 2nd 200.

To all of which defendant excepts.

Dated at Des Moines, Iowa, this 10th day of August, A.D. 1943.

CHAS. A. DEWEY,
Judge.

Service of these Findings of Fact and Conclusions of Law is hereby accepted and receipt of a true copy thereof acknowledged on this 10th day of August, A.D. 1943.

UNITED STATES OF AMERICA,
Defendant.

By Wm. R. Sheridan
Assistant U. S. Attorney.

[fol. 28] Judgment Entry

Filed in U. S. District Court August 10, 1943.

Now on this 10th day of August, A.D. 1943, the above entitled matter came on for hearing before the Honorable Charles A. Dewey, Judge of the United States District Court, Southern District of Iowa, Central Division.

The case having been heretofore fully submitted and the Court after hearing the evidence and arguments and being fully advised in the premises made Findings of Fact and Conclusions of Law in which he found in favor of this plaintiff.

The court further finds that plaintiff is entitled to a Judgment of $59,718.88 together with interest thereon to date in the amount of $19,309.89.

It Is Therefore Hereby Ordered, Adjudged And Decreed that plaintiff should be and it is hereby given a Judgment in its favor and against the defendant in the amount of $79,028.77. United States of America excepts.

CHAS. A. DEWEY,
Judge.

[fol. 29] Notice of Appeal

Filed in U. S. District Court on October 6, 1943.

United States of America, the defendant above named, hereby appeals to the United States Circuit Court of Appeals for the Eighth Judicial Circuit from the judgment

entered herein in favor of the plaintiff and against the defendant in the sum of $59,718.88, and interest.

MAURICE F. DONEGAN,
United States Attorney.

Des Moines, Iowa,
Oct. 6, 1943.

Copy of Notice of Appeal mailed to Haemer, Wheatcraft, 426 Fleming Bldg., Des Moines, Iowa, Attorney for Plaintiff.

N. F. REED, Clerk,
By Geneva E. Thoma, Deputy.

[fol. 30] (Designation of matters to be contained in transcript on appeal.)

Filed in U. S. District Court on October 9, 1943.

United States of America, the defendant above named, hereby designates the following to be included in the record on appeal in the above entitled cause:

1. Summons and Complaint.
2. Answer.
3. Opinion of the Court.
4. Findings of Fact and conclusions of Law.
5. Judgment.
6. Notice of appeal.

MAURICE F. DONEGAN,
United States Attorney.

CLOID I. LEVEL,
Assistant United States Attorney.

WILLIAM R. SHERIDAN,
Assistant United States Attorney.

[fol. 31] Statement of Points

Filed in U. S. District Court on October 23, 1943.

United States of America, the defendant above named, intends to rely upon the following points:

1. The District Court erred in permitting the deduction of advertising and selling costs from the manufacturer's prices in computing the tax under Section 603 of the Revenue Act of 1932.

2. The District Court erred in holding that Section 619 (a) of the Revenue Act of 1932 permits, in determining the price upon which the manufacturer's excise tax shall be assessed, the exclusion of advertising and selling expenses of the manufacturer.

MAURICE F. DONEGAN,
United States Attorney.

C. I. LEVEL,
Assistant United States Attorney.

WM. R. SHERIDAN,
Assistant United States Attorney.

Acceptance of Service of Statement of Points Filed in U. S. District Court October 30th, 1943.

Service of the Statement of Points Accepted this 23rd day of October, 1943, and copy received.

HAEMER WHEATCRAFT,
One of the Attorneys of Record for the Plaintiff.

[fol. 32] Clerk's Certificate to Transcript.

United States of America
Southern District of Iowa—ss.:

I, N. F. Reed, Clerk of the District Court of the United States for the Southern District of Iowa, hereby certify the foregoing 31 pages to contain a full, true and complete transcript of the record in the case of The F. W. Fitch Company (a corporation), Plaintiff, vs. United States of America, Defendant, No. 191-Civil, Central Division, as called for in the Designation of the parts of the record, proceedings and evidence to be included in the Record on Appeal, filed October 9, 1943, as full, true and complete as

the originals thereof on file and of record in office in the City of Des Moines, in said District.

In Witness Whereof, I hereunto set my hand and affix the seal of said Court at office in the City of Des Moines, in said District this 1st day of November, A. D. 1943.

Seal
U. S. Dist. Court
Dist. of Iowa.

N. F. REED,
Clerk, United States District Court, Southern District of Iowa.

Filed Nov. 2, 1943, E. E. Koch, Clerk.

[fol. 32] And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz.:

(Appearance of Mr. Samuel O. Clark, Jr., and Mr. Sewall Key as Counsel for Appellant.)

United States Circuit Court of Appeals,
Eighth Circuit.

United States of America, Appellant,
No. 12749. vs.
The F. W. Fitch Company.

The Clerk will enter our appearances as Counsel for the Appellant.

SAMUEL O. CLARK, JR.,
Assistant Attorney General

SEWALL KEY,
Special Assistant to the Attorney General.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Nov. 2, 1943.

(Appearance of Mr. Maurice F. Donegan as Counsel for Appellant.)

The Clerk will enter my appearance as Counsel for the Appellant.

MAURICE F. DONEGAN,
United States Attorney.

(CLOID I. LEVEL)
Ass't U. S. Attorney.

(WM. R. SHERIDAN)
Ass't U. S. Attorney.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Nov. 6, 1943.

[fol. 33] (Appearance of Mr. Frederic G. Rita as Counsel for Appellant.)

The Clerk will enter my appearance as Counsel for the Appellant.

FREDERIC G. RITA,
Special Ass't to the Attorney General.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Mar. 8, 1944.

(Appearance of Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

ARNOLD F. SCHAETZLE,
RICHARD E. WILLIAMS,
HAEMER WHEATCRAFT,
203 Hubbell Building,
Des Moines (9) Iowa.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Nov. 8, 1943.

[fol. 34] (Order of Submission.)

March Term, 1944.

Wednesday, March 8, 1944.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Frederic G. Rita, Special Assistant to The Attorney General, for appellant, continued by Mr. Arnold F. Schaetzle and Mr. Richard E. Williams for appellee, and concluded by Mr. Frederic G. Rita, Special Assistant to The Attorney General, for appellant.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

[fol. 35] (Opinion.)

United States Circuit Court of Appeals,
Eighth Circuit.

No. 12,749.

United States of America, Appellant,
vs.
The F. W. Fitch Company, a corporation, Appellee.

Appeal from the District Court of the United States for the Southern District of Iowa.

[March 29, 1944.]

Mr. Frederic G. Rita, Special Assistant to the Attorney General (Mr. Samuel O. Clark, Jr., Assistant Attorney General, Mr. Sewall Key, and Mr. A. F. Prescott, Special Assistants to the Attorney General, Mr. Maurice F. Donegan, United States Attorney, and Mr. Cloid I. Level and Mr. William R. Sheridan, Assistant United States Attorneys, were with him on the brief) for appellant.

Mr. Arnold F. Schaetzle and Mr. Richard E. Williams (Mr. Haemer Wheatcraft was with them on the brief) for appellee.

Before SANBORN, THOMAS and RIDDICK, Circuit Judges.

SANBORN, Circuit Judge, delivered the opinion of the Court.

The question presented by this appeal is whether § 619 (a) of the Revenue Act of 1932 (c. 209, 47 Stat. 169, 267;

26 U.S.C.A. Internal Revenue Acts, p. 618) authorized the deduction of advertising and selling expenses in computing the price upon which the manufacturers' excise tax imposed by § 603 of the Act (c. 209, 47 Stat. 169, 261; 26 U.S.C.A. Internal Revenue Acts, p. 608) is based.

Section 603 of the Revenue Act of 1932 imposed an excise tax upon toilet preparations sold by manufacturers, producers and importers, equivalent to a certain percentage of "the price for which so sold." Section 619(a) of the Act provided:

"In determining, for the purposes of this title, the price for which an article is sold, there shall be included any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment, but there shall be excluded the amount of tax imposed by this title, whether or not stated as a separate charge. A transportation, delivery, insurance, installation, or other charge (not required by the foregoing sentence to be included) shall be excluded from the price only if the amount thereof is established to the satisfaction of the Commissioner, in accordance with the regulations."

The appellee, during the tax period October 1, 1936, to and including the month of June, 1939, manufactured and sold toilet preparations which were subject to the excise tax. In computing prices in its monthly excise tax returns it made no deductions for its advertising or selling expenses. In October, 1940, it filed a claim for a refund of $67,666.39 based upon its failure to deduct such expenses in determining prices. The Commissioner of Internal Revenue denied the claim for refund upon the ground that, under § 619(a), advertising and selling expenses were not deductible in determining selling prices. The appellee brought this action to recover its alleged overpayment of excise taxes. The case was tried without a jury. The District Court determined that the appellee was entitled to deduct advertising and selling expenses in computing its

prices on toilet preparations subject to the excise tax, and that its failure to take these deductions had resulted in overpayment of its taxes to the extent of $59,718.88, which it was entitled to recover with interest. A judgment was entered accordingly, and this appeal followed.

The words of § 619(a) which give rise to this controversy are the words "or other charge" found in the second sentence of the section, which sentence, so far as pertinent, reads: "A transportation, delivery, insurance, installation, or other charge * * * shall be excluded from the price * * *." The appellee argues that the plain meaning of this language is that all nonmanufacturing costs are to be excluded by a manufacturer in determining selling price for the purposes of the excise tax. The government contends that no authorization for excluding advertising or selling expenses can reasonably be deduced from the words "or other charge" in the light of their context or the legislative history of the statute.

The appellee's construction of § 619(a) is sustained by the decisions of the Circuit Court of Appeals of the Seventh Circuit in *Campana Corporation* v. *Harrison*, 114 F.2d 400, 411, and *Campana Corporation* v. *Harrison*, 135 F.2d 334, 336. The government's interpretation of the section is supported by the Court of Claims in *Ayer Co.* v. *United States*, 38 F.Supp. 284, 289. The court below was of the opinion that the construction placed upon § 619(a) by the Circuit Court of Appeals of the Seventh Circuit was correct.

It seems clear to us that the words "or other charge" must be taken and understood to mean "or other like charge". This because of the familiar rule of *ejusdem generis*. (*United States* v. *Gilliland*, 312 U.S. 86, 93.) We do not regard the expense of advertising and selling an article as being substantially similar to a charge for the transportation, delivery, insurance, or installation of the article sold. The charges expressly specified in § 619(a) to be excluded in determining the manufacturer's price for

the purpose of excise tax are not manufacturing costs, but they obviously have little or no relation to expenditures made by the manufacturer to create a market for or to sell his products. It is possible, of course, that Congress may have intended that, for the purpose of the excise tax, the price should not include the manufacturer's advertising and selling expense, but, if so, the intent was very inadequately expressed. The legislative history of § 619(a), we think, shows no clear Congressional purpose to exclude advertising and selling costs in determining the price of articles subject to the excise tax.

In *Helvering* v. *Rebsamen Motors, Inc.*, 128 F.2d 584, 587-588, this Court said: "One may honestly and reasonably believe that in drafting a taxing act Congress uses the language which most nearly expresses the legislative intent, and that if the language used fails properly to express that intent, corrections should be made by Congressional action and not by Treasury regulations or by judicial construction."

In the Revenue Act of 1939, enacted June 29, 1939 [c. 247, § 3(a), 53 Stat. 863; 26 U.S.C.A. Internal Revenue Acts, pages 1167-1168], Congress provided that, in determining the selling price of articles subject to the manufacturers' excise tax on toilet preparations, there should be excluded "a transportation, delivery, insurance, or other charge, and the wholesaler's salesmen's commissions and costs and expenses of advertising and selling," but made this amendment effective "only with respect to sales made after the date of the enactment of this Act." The changes made in the statute in 1939 are not, we think, of controlling significance in determining the intent of Congress in enacting § 619(a) of the Revenue Act of 1932. Compare *Helvering* v. *Rebsamen Motors, Inc., supra.* These changes indicate, however, that it was not the understanding of the Congress which made them that prior to June 29, 1939, advertising and selling costs were deductible in de-

termining the selling price of an article subject to the excise tax.

While we dislike to differ with the Circuit Court of Appeals of the Seventh Circuit with respect to the construction of § 619(a) of the Revenue Act of 1932, it is our opinion that that section reasonably may not be construed as authorizing a manufacturer to deduct advertising and selling expenses in determining the prices of his products subject to the excise tax.

The judgment appealed from is reversed, and the case is remanded with directions to enter a judgment dismissing the appellee's complaint.

[fol. 40] (Judgment.)

United States Circuit Court of Appeals,
Eighth Circuit.

March Term, 1944.

Wednesday, March 29, 1944.

United States of America, Appellant,
No. 12749. vs.
The F. W. Fitch Company, a corporation.

Appeal from the District Court of the United States for the Southern District of Iowa.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Iowa, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby reversed without the taxation of costs in favor of either of the parties in this Court.

And it is further Ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court with directions to enter a judgment dismissing the appellee's-plaintiff's complaint.

March 29, 1944.

[fol. 41] (Clerk's Certificate.)

United States Circuit Court of Appeals,
Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Southern District of Iowa as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause wherein the United States of America was Appellant and The F. W. Fitch Company, a Corporation, was Appellee, No. 12749, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the 17th day of April, A. D., 1944, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the Judges of the District Court of the United States for the Southern District of Iowa.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this 11th day of May, A. D., 1944.

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

[fol. 42] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.